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OFFICE OF PETITIONS

In re Application of
Hector A. D'Auvergne
Application No. 10/803,124
Filed: March 16, 2004
Attorney Docket No. 4359

ON PETITION

This is a decision in response to the petition to withdraw the holding of abandonment under 37 CFR 1.181 filed September 19, 2006, which is being treated as a petition under 37 CFR 1.137(b) to revive the above-identified application.

A review of the record discloses that the application became abandoned for failure to pay the issue/publication fee on or before April 3, 2006. A Notice of Abandonment was mailed on August 24, 2006. In response, on September 19, 2006, the present petition was filed. Petitioner argues that the issue/publication fee was timely filed in view of an accompanying petition for extension on May 2, 2006.

Petitioner's argument is not well taken. The Notice of Allowance and Fee(s) Due mailed January 3, 2006 clearly states that the issue fee and publication fee must be paid within three months from the mailing date of the notice or the application shall be regarded as abandoned. The Notice further states that the period set for paying the issue fee is a statutory period which cannot be extended. See 35 U.S.C 1.51. The issue/publication fee was not paid until May 2, 2006, which is clearly after the due date of April 3, 2006. Consequently, the application was properly held abandoned.

The petition to withdraw the holding of abandonment under 37 CFR 1.181 is **DISMISSED**.

Since there is no basis for treated the petition under 37 CFR 1.137(a), the petition is being treated as a petition to revive under the provision of 37 CFR 1.137(b). The \$750 petition fee is being charged to counsel's deposit account as authorized.

A grantable petition under 37 CFR 1.137(b)¹ must be accompanied by: (1) the required reply,² unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D).

¹ As amended effective December 1, 1997. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53194-95 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 119-20 (October 21, 1997).

² In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

The petition lacks item (3) the required statement of unintentional delay.

Accordingly, the petition under 37 CFR 1.137(b) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)" as well as the omitted item(s) noted above. This is **not** a final agency action within the meaning of 5 U.S.C. ' 704.

Extensions of time under 37 CFR 1.136 are available only if asked for prior to or within the response period set by statute. In no case, however, may an applicant respond later than the maximum time period set by statute. The petition for extension of time submitted with the issue/publication fee on May 2, 2006 and the one submitted with the present petition on September 19, 2006 were filed when the provisions of 37 CFR 1.136 could no longer be used. This application became abandoned when the unextended time for response had expired, i.e., April 4, 2006. Since no extension of time fees are due on a petition for revival, no fees will be charged for the petition for extension of time filed September 19, 2006. The extension fee paid May 2, 2006 was submitted after abandonment; therefore, the fee is being credited to counsel's deposit account.

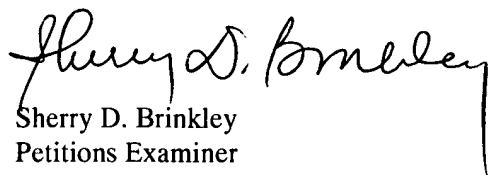
Further correspondence with respect to this matter should be addressed as follows:

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The centralized facsimile number is (571) 273-8300.

Any questions concerning this matter may be directed to the undersigned at (571) 272-3204.


Sherry D. Brinkley
Petitions Examiner
Office of Petitions